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RESPONSE REQUESTED
12/27/95

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-992

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Movants-Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents-Appellees.

On Appeal from the United States District Court
for the District of Columbia

OPPOSITION OF CFA, *ET AL.* TO MOTION TO EXPEDITE

Respondents-Appellees Consumer Federation of America, the National Council of Senior Citizens, and the Office of Communication of the United Church of Christ (hereinafter "CFA, *et al.*"), submit this opposition to the Appellants' Motion to Expedite.[1]

CFA, *et al.* adopt the arguments and position of the federal Respondents-Appellees as submitted to the Court on this date. CFA, *et al.* appear here separately only to emphasize what Judge Williams stated in his dissent below, that

> Congress's overriding goal in enacting must-carry was to "preserve access to free television programming for the 40% of Americans without cable." *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. [2445,] 2461 [1994]).

Turner Broadcasting System, Inc. v. FCC, No. 92-2247 (Williams, J., dissenting). J.S. App. 42a. While this Court, and the District Court on remand below, have recognized that the cable industry plaintiffs in this case have asserted important First Amendment rights which are entitled

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[1]Pursuant to direction of this Court, this response has been prepared for submission on or before 2 p.m., December 27, 1995.

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to serious scrutiny, the interests of the viewers represented by CFA, *et al.* to have access to free commercial and non-commercial television are also implicated. The fact that use of the standard established by this Court in its remand has led the lower court to uphold the provisions here at issue argues against hasty appellate review. In light of the extensive legislative process underlying the adoption of the Cable Television Consumer Protection Act of 1992, and the huge factual record adduced in the District Court, any reversal by this Court should be at the end of a thoughtful and judicious review.

Movants have offered no basis for concluding that this exercise should be conducted at breakneck speed. Their motion should be denied.

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December 27, 1995

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No. 95-992

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

TURNER BROADCASTING SYSTEM, INC., et al.,
Movants-Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,
Respondents-Appellees.

OPPOSITION TO MOTION TO EXPEDITE

Appellees the National Association of Broadcasters ("NAB"), the Association of Independent Television Stations ("INTV"), the Association of America's Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting oppose the motion to expedite consideration of the instant appeal.

This case involves a challenge to the constitutionality of the "must carry" provisions of the Cable Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 534-35. In an earlier appeal, this Court rejected movants' argument that those provisions should be subject to strict scrutiny, holding instead that they should be reviewed under the relatively lenient standards of United States v. O'Brien, 391 U.S. 367 (1968). Turner v. FCC, 114 S. Ct. 2445 (1994). The Court remanded to the three-judge court with explicit instructions that in applying the O'Brien standard, that court "must accord substantial deference to the

predictive judgments of Congress," and must not "reweigh the evidence [before Congress] de novo," or "replace Congress' factual predictions with [its] own." Id. at 2471. In particular, the three-judge court's task was limited to assuring "that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." Id.; see Memorandum And Order, J.S. App. 4a (applying that standard).

On remand, after development of a truly enormous factual record,[1] the majority of the three-judge court concluded there was substantial evidence supporting the reasonableness of Congress' predictive judgments. See J.S. App. 6a-7a (Sporkin, J.); J.S. App. 33a (Jackson, J., concurring). That record also showed that must-carry's aggregate effects on cable operators and cable programmers has been de minimis. For example, movants' expert demonstrated (and the court below found) "that only 1.2 percent of the cable channel capacity is occupied by broadcast stations added to cable systems as a result of the must-carry rules," and that "only 640 out of 11,628 cable systems" had to drop even a single cable programmer (out of an average line-up of 43 channels) because of the addition of broadcast stations as a result of the must-carry provisions. J.S. App. 19a, 20a. As the Court below found, this "burden"

[1] Movants' submissions below exceeded 12,000 pages. Appellees submitted more than twice that number of pages, including a compilation of the relevant portions from the congressional record that alone numbered more than 18,000 pages.

was both de minimis and diminishing. J.S. App. at 20a-21a. Indeed, the record in this case shows that the growth in channel capacity every twenty-six days is equivalent to the total channel capacity that has been used for broadcast stations added pursuant to the must carry requirements.[2]

In these circumstances, expedited review is both unnecessary and inappropriate.

1. The stated premise of movants' plea for expedited review is their assertion that they can prevail on appeal simply by arguing "essentially legal issues [that are] readily capable of resolution this Term." Motion at 1; id. at 5. But that premise is plainly incorrect. The principal legal issues have already been decided by this Court.[3] Under the test established by this Court, movants cannot prevail unless they persuade this Court that the enormous factual record before Congress does not contain substantial evidence from which Congress could reasonably have made the factual and predictive judgments it made. It would be impossible for this Court to canvass that record with the care owed a coordinate branch of government in the two or three months that would be available this Term. Indeed, even

[2] Reply Br. of NAB and INTV in support of Defendants' Motions for Summary Judgment, Exhibit A, ¶ 41 (and sources cited therein).

[3] As movants acknowledge, this Court remanded the case not for consideration of any legal issues, but for consideration of certain "unresolved factual questions." Motion at 2 (quoting 114 S. Ct. at 2472). And it is the three-judge district court's resolution of these factual questions that movants' are asking this Court to review.

though, as movants acknowledge (Motion at 2-3), the three-judge court was expediting its consideration of the record as much as possible, it took that court nearly five months to evaluate the record. And that court upheld the statute. Obviously, even greater care would be required before this Court could reverse that judgment, and strike down a presumptively constitutional statute that has been in effect more than three years. Thus, no matter how much this appeal was expedited, it would not be possible for this Court to decide the case in movants' favor this Term.

It would be possible, however, to decide this case in appellees' favor this Term, based on the arguments appellees will make in their motions to affirm. The dispositive issue is whether Judge Sporkin's opinion for the three-judge court applied the correct standard of review to Congress' factual and predictive judgments. Judge Sporkin stated the standard as follows:

> "The Court's role is not to determine whether an inference [by Congress] is 'correct,' or whether a given inference is more reasonable -- it is not to substitute its opinion for that of Congress. As long as there is no material dispute that there is substantial evidence from which Congress could have drawn a reasonable inference, then the government is entitled to summary judgment."

J.S. App. 6a. As appellees will show in our motions to affirm, (1) that formulation of the standard of review is entirely faithful to this Court's prior opinion (and is, indeed, required by separation of powers principles), (2)

that standard was applied in a straightforward manner to the factual record, and (3) there can be no serious dispute that the record contains, at the least, substantial evidence from which Congress could reasonably draw the inferences on which must-carry is based.[4/] But an expedited schedule would hinder appellees' ability to make this showing. Therefore, the only realistic prospect of a decision this Term is to allow normal briefing and consideration of appellees' motions to affirm.

2. This case simply does not present the kind of extreme circumstances that would warrant the expedited schedule movants propose. Compare New York Times Co. v. United States, 403 U.S. 713 (1971); United States v. Nixon, 418 U.S. 683 (1974); Dames & Moore v. Regan, 453 U.S. 654 (1981).

a. The practical arguments advanced by movants are wholly unpersuasive. The must-carry provisions have been in

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[4/] Judge Williams' dissenting opinion, on which movants rely extensively in their jurisdictional statement, did not apply the standard of review established by this Court. Instead, Judge Williams engaged in a Lochnerian tour de force -- subjecting Congress' assessments of legislative facts and predictions of future trends to de novo reconsideration based on a particular view of economics, and concluding that Congress' judgments were not "correct" and that Congress' predictions were not the most reasonable predictions. That type of de novo review was foreclosed by this Court's prior opinion. Turner, 114 S. Ct. at 2471.

Moreover, even if the Court were to conclude, as movants argue, that Congress' judgments are entitled to virtually no deference, this Court would then be forced to engage in a wide-ranging examination of the record, which runs to tens of thousands of pages. Accepting movants' invitation to expedite review would commit the Court to undertaking this enormous task under extreme time pressure during the busiest period of this Court's calendar -- May and June.

effect for three years, without imposing any material burden on cable operators or programmers. As the figures derived by movants' own expert showed, because of unused and expanding channel capacity, cable operators were in a position to carry more than 99.8 percent of their existing programming choices, notwithstanding the must carry requirements.[5] Moreover, all of the cable programmer movants in this case have experienced significant increases in carriage and subscribership since the enactment of the Cable Act; none of the cable programmer movants has even claimed they were subject to adverse action on even 1 percent of the cable systems on which they are carried.[6]

Expedited review is not necessary to eliminate any "grave uncertainty." To the contrary, during the past three years, the applicable carriage rules have become increasingly certain. Three years ago, the must carry rules carried the presumption of constitutionality given all Congressional

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[5] See Reply Br. of NAB and INTV in support of Defendants' Motions for Summary Judgment, Exhibit A, ¶ 15 (using figures from movants' expert). Movants point to numbers cited in Judge Williams' dissent as to the impact that movant Time Warner claims must carry had on its cable systems -- 240 broadcast stations added and 75 channels of programming dropped, see Motion at 8, n. 6. -- but neglect to provide this Court with the undisputed factual context from which those figures were drawn. Time Warner's systems had more than 12,410 channels. Thus, even if Time Warner's claims were true -- and they were contested by appellees below -- must carry affected less than 1/2 of one-percent of Time Warner's programming choices. As these numbers show, and as the court below found, the impact on Time Warner and other cable operators has been de minimis.

[6] Reply Br. of NAB and INTV in support of Defendants' Motions for Summary Judgment, Exhibit A, ¶¶ 27-30 (using claims of adverse action made by plaintiff programmers).

legislation. Since then, the district court has found these rules constitutional, this Court has confirmed these rules are subject only to O'Brien scrutiny, and the district court, applying O'Brien, has again upheld these rules. It is movants who would inject uncertainty into the marketplace by requesting expedited review.

The next election between must-carry and retransmission consent that broadcast stations will make in October 1996 does not create a pressing need for immediate resolution. If the Court upholds the must carry provisions, this will simply continue the status quo. If the Court were to strike down the must carry provisions, the impact on broadcast stations vulnerable to being dropped will be the same whether the Court strikes down these provisions in three months, one year, or later. Furthermore, any burden imposed by the election itself will fall entirely on the broadcast stations. Movants' argument on this score is simply that cable operators would prefer to be able to drop must-carry stations sooner rather than later.

Similarly, movants' claim that the current FCC proceedings exploring digital broadcast systems create a compelling need for expedited resolution is patently wrong. There is not even a remote possibility that the technology at issue in those proceedings will be implemented before the conclusion of the October 1996 Term of this Court. The FCC has requested comments on the policies it should follow in developing digital television, but is far from the near-term

implementation movants suggest. Indeed, the most recent proposal by the FCC envisions a six year process for application and construction of digital broadcast systems, with such systems only becoming available after the year 2000. Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry ¶¶ 61-63, 10 F.C.C. Rcd. 10,540 (Aug. 9, 1995).[7/] The FCC will thus have ample time to revisit the question in the unlikely event the district court is not affirmed.

b. The alleged "threat" to First Amendment interests argued with such vehemence by movants is no greater now than at any prior time in the three years the challenged "must carry" provisions have been in effect. In fact, the record has shown that the burden on cable operators and programmers has been far less substantial than movants initially argued it would be.[8/] Furthermore, the burden imposed by must carry, whatever its extent, indisputably

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[7/] A technical standard for digital television was transmitted to the FCC on November 28, but has not yet been submitted for public comment. See Communications Daily, vol. 15, no. 229, at 1 (Nov. 29, 1995). The FCC has also not yet begun to develop a channel allocation plan. All of these steps must be completed before any station can even apply to provide digital television service, much less construct a facility and begin operation.

[8/] For example, in the first appeal, cable operators claimed that must carry would override their editorial discretion with respect to "over 40% of a typical cable system's capacity." Br. of Appellant Time Warner Entertainment Co. at 30. In fact, it is undisputed that cable operators were "forced" to add broadcast stations on only 1.2% of their channel capacity. J.S. App. 19a, 20a.

diminishes with each passing day as cable's channel capacity continues its exponential growth.[9/] J.S. App. 20a-21a.

The alleged burden on cable operators and programmers was insufficient three years ago to warrant an injunction when movants first filed their challenge. It was likewise deemed insufficient to support movants' prior motion to this Court for an injunction pending appeal in 1993.[10/] Movants concluded that the burden was insufficient to support interim relief during the pendency of the remand proceedings before the three-judge court, for they did not seek such relief. Movants likewise appear to have concluded that the alleged burden remains insufficient to support an injunction pending appeal, for they do not seek such relief.

3. Expedited review cannot be justified on the ground that the three-judge court inappropriately delayed resolution of the case on remand. Having themselves submitted more than 12,000 pages of evidentiary materials in support of their summary judgment motions, as well as legal briefs in excess of one thousand pages, movants can hardly be heard to complain now about the five months the three-judge

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[9/] The average channel capacity available to subscribers is expected to grow between 10 and 20 channels per year from 59 channels in 1996 to 180 channels in 2003. J.S. App. at 21a.

[10/] Turner v. FCC, 113 S. Ct. 1806 (1993) (Rehnquist, C.J., as Circuit Justice).

court needed (after a full day of oral argument) to assess the evidence and reach a considered judgment.[11/]

4. There is no indication from this Court, or from Congress, that expedition of this appeal is warranted. When it remanded, this Court did not direct that proceedings be expedited, and set no deadline for resolution by the three-judge court. As movants note (Motion at 4), one of the three judges indicated that, rather than resolve the case on summary judgment motions, trial might be appropriate. Obviously, had there been a trial, this case would not have been before this Court this Term. Similarly, if this Court were to conclude that trial of the disputed facts is necessary, final resolution of this case would not be possible this Term.[12/]

The general provision governing appeals from three-judge courts does not require expedited consideration, 28 U.S.C. § 1253, and the special jurisdictional provision governing this three-judge court pointedly requires expedited appeal only if the three-judge court finds the must-carry provisions unconstitutional. 47 U.S.C. § 555(c)(2).

[11/] Similarly, having deposed or subpoenaed records from more than 125 third parties, and served discovery requests of unprecedented magnitude -- including more than 400 pages of requests for admissions alone -- movants cannot be heard to complain about the time required to prepare this case for submission to the three-judge court.

[12/] It is inconceivable, given the extensive evidence supporting appellees' views regarding disputed facts, that this Court would itself resolve those disputed facts against appellees. Accordingly, if the Court concludes that resolution of the disputed facts is required, a further remand will be necessary.

5. The importance of the issues in this case cuts decisively against truncating the schedule as movants propose. At issue is a law passed by Congress after more than three years of hearings during which Congress amassed a record of many thousands of pages.[13/] Based on that record, and on that record plus tens of thousands of pages of additional factual submissions, the district court upheld the must carry provisions. J.S. App. 7a. Truncating this Court's consideration of must carry would be inconsistent with the deference due Congress as policymaker and due the district court as factfinder. This Court can properly decide whether plenary review is necessary only after full briefing and careful consideration of appellees' motions to affirm.

[13/] The relevant congressional record -- including numerous congressional hearings as well as FCC proceedings that were either undertaken at the direction of Congress or were otherwise relied upon by Congress in enacting the must carry provisions -- exceeds 18,000 pages.

CONCLUSION

The motion for expedited consideration should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that one copy of the National Association of Broadcasters, the Association of Independent Television Stations, the Association of America's Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting's Opposition to Motion to Expedite in Turner Broadcasting Sys., Inc. v. FCC, was served on the 27th day of December on the following:

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